No. 14,601

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and COREY GABRIELSON,

Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

The complaint (Tr. 3), the supplemental complaint (Tr. 7) and the amendment to complaint to conform to evidence (Tr. 39) allege that, within one year immediately preceding the commencement of the action, the defendants demanded, accepted and received from the plaintiff, as rent for housing accommodations, sums in excess of the maximum lawful rents permissible under the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. Sec. 1881 et seq.) and the Housing Rent Regulation adopted pursuant thereto (Rent Regulation 1, 16 Federal Register 12,879, et seq.).

The jurisdiction of the trial court was founded on Section 205(a) and 205(c) of the Housing and Rent Act of 1947 as amended (50 U.S.C.A. App. Sec. 1895(a) and Sec. 1895(c)).

The jurisdiction of this court on appeal is founded on 28 U.S.C.A., Sec. 1291, which grants jurisdiction to review "final decisions" of the district courts. The judgment appealed from (Tr. 58) was made on October 12, 1954, and entered on October 13, 1954. The notice of appeal (Tr. 59) was filed with the clerk of the District Court on November 8, 1954, which was within the time allowed by Rule 73 of the Rules of Civil Procedure.

STATEMENT OF THE CASE.

1. Overcharges of Rent.

This is an action for treble damages for overcharges of rent. The premises involved in the action were situated in the Township of Pleasanton, Alameda County, California, within the Southern Alameda County Defense Rental Area (alleged in paragraph III of the complaint, Tr. 4, and admitted by paragraph III of the answer, Tr. 9). Housing accommodations in the Southern Alameda County Defense Rental Area were brought under control on January 12, 1952, by executive order which established November 1, 1951, as the maximum rent date and January 14, 1952, as the effective date (17 Federal Register 403).

It was conceded by the appellees at the trial of this action that the lease involved here was subject to rent control pursuant to the provisions of Section 39(c) of Rent Regulation 1, Housing Rent Regulation (16 Federal Register 12,879 et seq.) (Tr. 63).

Insofar as concerns the establishment of the lawful maximum rent, the amounts of money paid and received as rent, and the amount of overcharges—the facts in this case are not in dispute. They are admitted by the pleadings, or by the defendants' admissions on file in response to requests for admissions under Rule 36, were stipulated at the trial or, in one or two respects, were established by uncontradicted and unquestioned evidence admitted at trial. Briefly stated they are as follows:

On December 31, 1951, the appellant, as lessee, entered into a lease with the appellees as lessors (Plaintiff's Exhibit No. 1). (A copy of this lease is attached to the defendants' answer and appears in the printed record at Tr. 12 et seq.) This lease is the master lease or underlying lease of certain motel premises (Tr. 72). The premises were not rented on the maximum rent date, November 1, 1951, were, in fact, under course of construction at that time, and were first rented under the lease above referred to (Tr. 65; Tr. 87, 88; Request for admission No. 2, Tr. 37, admitted by answer to request for admissions, Tr. 38).

The lease provided by its terms for varying amounts of rental during the leasehold term. For the first two months, January 1, 1952, to February 29,

1952, the rent was fixed at the amount of gross receipts from the operation of the demised premises by the lessee, less Five Hundred and 00/100 Dollars ($500.00) per month; for the period March 1, 1952, to and including September 30, 1952, the rent was fixed at the amount of gross receipts less Five Hundred and 00/100 Dollars ($500.00) or Two Thousand and 00/100 Dollars ($2,000.00), whichever amount was the higher; for the period subsequent to October 1, 1952, the rent was fixed at Three Thousand and 00/100 Dollars ($3,000.00) per month (Plaintiff's Exhibit 1; Tr. 13). Inasmuch as the appellant's tenancy terminated on October 1, 1952 (Tr. 78) and this action involves only matters prior to that time, the Three Thousand and 00/100 Dollars ($3,000.00) per month provision in the lease has no direct bearing on any issue here.

For the month of January, 1952, the gross receipts from the operation of the motel business by the appellant were less than Five Hundred and 00/100 Dollars ($500.00) (Plaintiff's Exhibits No. 2 and No. 3) and no rent was paid for the month of January (Tr. 73). For the month of February, 1952, the gross receipts from the operation of the motel business by the appellant were Six Hundred and Fifty-Six and 00/100 Dollars ($656.00) which should have produced a rental payment of One Hundred Fifty-Six and 00/100 Dollars ($156.00) for the month of February in accordance with the formula provided for by the lease. However, apparently by reason of mathematical miscalculation, the rent paid for February was a

slightly higher amount, namely One Hundred and Seventy-Five and 00/100 Dollars ($175.00) (Tr. 89, 90; Tr. 65, 66). This was the first money actually paid as rent for the premises (Tr. 90).

Subsequently, for each of the months of March, April and May, 1952, the appellant paid and the appellees received the sum of Two Thousand and 00/100 Dollars ($2,000.00) as rent for the premises. This is alleged in the complaint (Tr. 5); it is admitted in the answer that the appellees received said sums as rent (Tr. 10); it was stipulated at the trial that the said sums were received as rent for the housing accommodations in question and that said sums were received as rent for the monthly periods alleged (Tr. 64).

It is the appellant's contention that the maximum lawful rent for the subject housing accommodations was the "first rent" and that such "first rent" was the formula: gross receipts less Five Hundred and 00/100 Dollars ($500.00). The gross receipts for the months of March, April and May, 1952, were, respectively, Nine Hundred Forty-Four and 00/100 Dollars ($944.00), One Thousand Two Hundred Sixty-Two and 50/100 Dollars ($1,262.50) and Two Thousand Four Hundred Sixty-Two and 00/100 Dollars ($2,462.00) (Plaintiff's Exhibits No. 2 and No. 3). Applying the formula, the lawful maximum rent for the month of March, 1952, was Four Hundred Forty-Four and 00/100 Dollars ($444.00), for the month of April, 1952, was Seven Hundred Sixty-Two and 50/100 Dollars ($762.50) and for the month

of May, 1952, was One Thousand Nine Hundred Sixty-Two and 00/100 Dollars ($1,962.00). Inasmuch as the rent paid for each of those months was Two-Thousand and 00/100 Dollars ($2,000.00) the resulting claimed single overcharges were One Thousand Five Hundred Fifty - Six and 00/100 Dollars ($1,556.00), One Thousand Two Hundred Thirty-Seven and 50/100 Dollars ($1,237.50) and Thirty-Eight and 00/100 Dollars ($38.00) for the months of March, April and May, 1952, respectively; and the total claimed single overcharges for that period were Two Thousand Eight Hundred Thirty-One and 50/100 Dollars ($2,831.50).

At no time prior to October 1, 1952, was any administrative order made or issued fixing, increasing or otherwise adjusting the maximum rent allowable for the leased premises (Tr. 79, 80; Request for Admission No. 6, Tr. 37, admitted by Answer to Request, Tr. 39).

The facts, as above set forth, bearing on the issue of the maximum lawful rent and the amount of single overcharges are not in dispute between the parties.

2. Treble Damages.

In view of the judgment denying recovery of any overcharges, it was not necessary for the trial court to pass upon the issue of treble damages. However, in response to the plaintiff's complaint for treble damages, the defendants pleaded a defense of "good faith" (Tr. 11) and later were permitted an amend-

ment to plead that the overcharge, if any, was not willful or the result of failure to take proper precautions (Tr. 68).

In this connection the evidence is that the appellees were advised by their attorneys in December, 1951, at the time the lease was being drafted, that the premises were not subject to rent control (Tr. 75, 92, 93). (The fact is that this was sound advice—the premises were not under control at that time.) The appellees made no further inquiries about the matter until late May or early June, 1952, when they first consulted the Area Rent Office in Hayward (Tr. 82, 83, 93). This failure to make inquiry for approximately six months was despite the fact that the appellee Gabrielson knew in February, 1952, that Parks Air Force Base, in the vicinity of the motel, was being reactivated and there were articles in the papers dealing with the possibility of rent control being re-established in that area (Tr. 108, 109).

SPECIFICATION OF ERRORS.

1. The trial court erred in failing to find as follows:

"On December 31, 1951, the defendants, as lessors, entered into a written lease with the plaintiff, as lessee, under the terms and provisions of which the plaintiff leased from the defendants the said premises commonly known and designated as the El Rancho Santa Rita Motel for a term of three years to com-

mence January 1, 1952. The said premises which were the subject of said lease were not rented at any time prior to December 31, 1951. Said premises were housing accommodations."

2. The trial court erred in failing to find that the appellant remained in possession of said premises as the tenant of appellees continuously from January 14, 1952, to and until September 30, 1952.

3. The trial court erred in failing to find as follows:

"Under the terms of the said lease executed by and between the defendants and the plaintiff, the plaintiff agreed to pay as rental for each of the first two months of the term—namely, for the months of January and February, 1952—the gross receipts from the plaintiff's operation of the said premises as a motel or motor court less the sum of Five Hundred and 00/100 Dollars ($500.00) each month. Under the terms of said lease, the plaintiff agreed to pay as rental for each of the months of March through September, 1952, his gross receipts as aforesaid less the sum of Five Hundred and 00/100 Dollars ($500.00), or the sum of Two Thousand and 00/100 Dollars ($2,000.00) whichever was the greater amount. The plaintiff operated said premises as a motel or motor court from January 14, 1952, until September 30, 1952. In the month of January, 1952, the gross receipts from the operation of the said premises by the plaintiff were less than Five Hundred and 00/100 Dollars ($500.00) and no rent was paid for that month. In the month of Febru-

ary, 1952, the gross receipts from the operation of said premises by the plaintiff were Six Hundred Fifty-Six and 00/100 Dollars ($656.00) and for the month of February, 1952, the plaintiff paid to the defendants the sum of One Hundred Seventy-Five and 00/100 Dollars ($175.00) as and for rent for said premises, there being a small overpayment of the rent payable under the lease arising out of mathematical mistake or miscalculation."

4. The trial court erred in failing to find as follows:

"At no time prior to October 1, 1952, did the Director of Rent Stabilization, or the Area Rent Director of the Defense-Rental Area of Southern Alameda County, or any other person or persons appointed or designated by the Director of Rent Stabilization to carry out any of the duties delegated to him pursuant to the Housing and Rent Act of 1947, as amended, make or issue an order fixing, increasing or otherwise adjusting the maximum rent allowable for the said premises which were the subject of said lease between the defendants and the plaintiff."

5. The trial court erred in failing to find as follows:

"Under the terms and provisions of the said lease between the defendants and the plaintiff, the plaintiff, as tenant, had no power to cancel or otherwise terminate the said lease prior to October 1, 1952."

6. The trial court erred in failing to find as follows:

"All of the individual housing accommodations in the said premises so leased by the defendants to the plaintiff, consisting of individual rooms and units in a motor court or motel, were controlled housing accommodations and were subject to the provisions of Rent Regulation 2."

7. The trial court erred in failing to find as follows:

"The gross receipts from the plaintiff's operation of the said leased premises as a motor court or motel were as follows: During the month of March, 1952, the sum of Nine Hundred Forty-Four and 00/100 Dollars ($944.00); during the month of April, 1952, the sum of One Thousand Two Hundred Sixty-Two and 50/100 Dollars ($1,262.50); during the month of May, 1952, the sum of Two Thousand Four Hundred Sixty-Two and 00/100 Dollars ($2,462.00); during the months of June through August, 1952, gross receipts in each month were not less than Two Thousand Five Hundred and 00/100 Dollars ($2,500.00). Within one year immediately prior to the commencement of this action the defendants demanded, accepted and received from the plaintiff as rent for the said housing accommodations leased from the defendants to the plaintiff the following sums: The sum of Two Thousand and 00/100 Dollars ($2,000.00) as and for rent for the month of March, 1952; the sum of Two Thousand and 00/100 Dollars ($2,000.00) as and for rent for the month of April, 1952; the sum of Two Thousand and 00/100 Dollars ($2,000.00) as and for rent

for the month of May, 1952; the sum of Two Thousand Four Hundred Thirty-Three and 00/100 Dollars ($2,433.00) as and for rent for the month of June, 1952; the sum of Two Thousand and 00/100 Dollars ($2,000.00) as and for rent for the month of July, 1952; and the sum of Two Thousand One Hundred Forty-Five and 00/100 Dollars ($2,145.00) as and for rent for the month of August, 1952."

8. The trial court erred in failing to find that the appellant has been required to employ and has employed counsel to institute, maintain and prosecute this action against the appellees and, further, in failing to find what amount would constitute reasonable attorneys' fees for the services performed by such counsel.

9. The trial court erred in finding (Tr. 56) as follows:

"Defendants believed that their Master Lease with plaintiff was not subject to rent control. Defendants did not learn that they were required to register the premises with the Office of Rent Control until May, 1952. At that time, they requested of the Area Rent Director that he decontrol the premises or fix a fair rental. This he sought to do under Rent Regulation 1, Section 166. The Rent Director failed to win approval of a decontrol recommendation and he did not establish a maximum rent. The Advisory Board in Alameda County informed the Rent Director that there were no comparable housing accommodations in the area to serve as a yardstick for fixing maximum

rent. Controls expired during this period and therefore no maximum rent was ever fixed for said premises."

Such finding was erroneous because, insofar as it purports to bear upon the issue of treble damage, it is insufficient to establish absence of willfulness or the taking of practicable precautions against the occurrence of the overcharge; and, insofar as it purports to apply the provisions of Section 166 of Rent Regulation 1 to the matters here involved, it proceeds from a misapprehension of the applicable law, Section 166 being entirely inapplicable to a determination of the maximum lawful rent.

10. The trial court erred in concluding (Tr. 56) that the maximum rental not having been declared or fixed in the first instance either by administrative process or judicial decree, any action fixing a maximum rental of an amount less than that called for in the lease would result in retroactive procedure wherein appellant would receive an unwarranted refund.

Such conclusion is erroneous in that the maximum lawful rent was fixed by the applicable rent regulation, it being the proper function of the court, on the basis of the facts admitted and in evidence, to determine and conclude what that maximum lawful rent was.

11. The trial court erred in concluding (Tr. 57) that the appellees were entitled to judgment against the appellant.

12. The trial court erred in failing to conclude that it had jurisdiction of the subject matter of this action and of the parties hereto.

13. The trial court erred in failing to conclude that the housing accommodations leased by the appellees to the appellant were controlled housing accommodations within the meaning of Rent Regulation 1 (Housing Rent Regulation) issued pursuant to the Housing and Rent Act of 1947, as amended.

14. The trial court erred in failing to conclude that, at all times between January 14, 1952, and September 30, 1952, the maximum lawful monthly rent for the said premises leased by the appellees to the appellant was the sum computed each month by taking the gross receipts from the appellant's operation of a motor court or motel on the leased premises and deducting therefrom the sum of Five Hundred and 00/100 Dollars ($500.00).

15. The trial court erred in failing to conclude that the amounts demanded, accepted and received by the appellees from the appellant as and for rent for said premises exceeded the maximum lawful rent for said premises in the amount of One Thousand Five Hundred Fifty-Six and 00/100 Dollars ($1,556.00) for the month of March, 1952, in the amount of One Thousand Two Hundred Thirty-Seven and 50/100 Dollars ($1,237.50) for the month of April, 1952, and the amount of Thirty-Eight and 00/100 Dollars ($38.00) for the month of May, 1952.

16. The trial court erred in failing to conclude that the appellant was entitled to recover from the appellees three times the amount of single overcharges of rent and, in addition thereto, a reasonable sum as attorneys' fees.

17. The evidence does not support or sustain the findings of fact and conclusions of law, as aforesaid.

18. The findings of fact do not support or sustain the conclusions of law.

19. The findings of fact and conclusions of law do not support or sustain the judgment herein.

20. The trial court erred in ordering, adjudging and decreeing that appellant take nothing by this action and that the appellees be awarded their costs herein.

ARGUMENT.

1. THE UNDERLYING LEASE BETWEEN THE APPELLANT AND THE APPELLEES WAS SUBJECT TO CONTROL UNDER THE PROVISIONS OF RENT REGULATION 1, HOUSING RENT REGULATION.

It was stipulated at the time of trial that the underlying lease between the plaintiff and defendants was subject to control pursuant to the provisions of Section 39(c) of Rent Regulations 1 (Tr. 63).

Section 39(c) provides:

> "This regulation does apply to an underlying lease of any entire structure or premises which was entered into after the maximum rent date and prior to the effective date of the regulation while such lease remains in force with no power

in the tenant to cancel or otherwise terminate the lease, unless all of the housing accommodations in such structure are exempt or decontrolled under the provisions of sections 36 to 58 and are not subject to the provisions of Rent Regulation 2."

The lease here involved was entered into on December 31, 1951 (Plaintiff's Exhibit No. 1) which was after the maximum rent date (November 1, 1951) and prior to the effective date (January 14, 1952); the maximum rent date and the effective date were so fixed in the order bringing Southern Alameda County Defense Rental Area under control (17 Federal Register 403, January 12, 1952); during the period in question the tenant had no power to cancel or terminate the lease (Plaintiff's Exhibit No. 1, Tr. 15); the housing accommodations in the structure were not exempt or decontrolled and were subject to the provisions of Rent Regulation 2.

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2. THE MAXIMUM RENT FOR THE PREMISES WAS FIXED BY SECTION 93 OF RENT REGULATION 1.

The rent regulations are clear and explicit. For housing accommodations in a defense-rental area not under control on September 19, 1951, the maximum rents are fixed by Sections 91-99 inc. of Rent Regulation 1. Section 93 applies to the instant situation. It provides:

"For housing accommodations not rented on the maximum rent date which are rented after the maximum rent date, the maximum rent shall

> be the first rent for such accommodations after the maximum rent date * * *"

The housing accommodations here involved were not rented on the maximum rent date (Tr. 65) construction of them was not completed until after that date (Tr. 87); they were first rented after the maximum rent date. Consequently the maximum rent is the *first rent* for such accommodations.

The fact that the lease provides for varying rent at other times during the term of the lease does not affect the situation. The basic prohibition against collecting excessive rent is contained in Section 71 of Rent Regulation 1, which prohibits the receipt of rent in excess of the maximum lawful rent *"regardless of any * * * lease * * * heretofore or hereafter entered into * * * *"* (Emphasis ours). It should further be noted that Section 130 expressly contemplates a situation where there may be varying rents under a lease. One of the grounds upon which the landlord may petition for an adjustment of rent is stated as follows:

> "Sec. 130. Varying rents. The rent on the date determining the maximum rent was established by a lease or other rental agreement which provided for a higher rent as other periods during the term of such lease or agreement."

It is clear that the provision in a lease for varying rents does not affect the establishment of the *first rent* as the maximum rent. It simply permits an application for adjustment. It is admitted that no application for adjustment was made and no order adjust-

ing maximum rent was ever issued (Defendants' Answer to Request for Admissions No. 6 and No. 7, Tr. 37, 39; Tr. 79, 110).

That the first rent is the maximum lawful rent would appear to be so evident from the plain language of the regulation as to beggar argument.

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3. THE FIRST RENT WAS GROSS RECEIPTS LESS FIVE HUNDRED AND 00/100 DOLLARS ($500.00).

The maximum lawful rent, as established by Section 93, is the first rent. What is the first rent?

In the language of the lease which is in evidence (Plaintiff's Exhibit 1) the first rent payable by the lessee was to be computed as follows:

> "From the commencement hereof, to and including the 29th day of February, 1952, Lessee shall pay over to Lessor each month as rent under this lease, the whole amount of the gross receipts from said operation on the demised premises, less Five Hundred Dollars ($500.00) per month only * * * "

Pursuant to that provision of the lease (Tr. 13) the lessee paid no rent to the lessors for the month of January, 1952 (Tr. 73), because the gross receipts were less than Five Hundred and 00/100 Dollars ($500.00) (Plaintiff's Exhibits No. 2 and No. 3); for the month of February the lessee paid to the lessors the sum of One Hundred Seventy-Five and 00/100 Dollars ($175.00) as rent (Tr. 89, 90). Gross receipts

less Five Hundred and 00/100 Dollars ($500.00) would have actually produced a rental of One Hundred Fifty-Six and 00/100 Dollars ($156.00), according to the evidence of gross receipts admitted at trial (Plaintiff's Exhibits No. 2 and No. 3). The small difference between One Hundred Fifty-Six and 00/100 Dollars ($156.00) and One Hundred Seventy-Five and 00/100 Dollars ($175.00) actually paid apparently resulted from some mathematical miscalculation.

No case has come to our attention in which the courts have had occasion to consider the meaning of the term "first rent" under circumstances similar to those here involved. However the same type of situation, involving the computation of rent on the basis of a percentage of gross receipts, was the subject of official interpretation by the Office of Price Administration in the early days of rent control. Although that interpretation deals with a percentage lease, the concept of gross receipts less a fixed sum is not so different as to warrant different treatment or consideration. In either case there is a formula involved for determining the maximum lawful rent; the maximum lawful rent is the formula itself, and not a definite amount in dollars; in the one case the maximum lawful rent is that percentage of gross receipts provided for on the maximum rent date, in the other case the maximum lawful rent is the formula of gross receipts less a fixed sum provided for on the maximum rent date. While the dollar amount of rent may fluctuate, in either case, depending on the amount of gross receipts, the formula in effect on the maximum rent

date remains the standard by which the allowable rent is computed.

The official interpretation referred to is as follows:

"1. A written lease of a hotel structure, in effect on the maximum rent date, provides for rent based on a percentage of the gross receipts from the operation of the hotel by the tenant. On April 1, 1941, the maximum rent date, the rent payable for the month in which the maximum rent date falls amounts to $150.00. Under the same lease the average monthly rent for 1941 amounts to $450.00.

Section 4 does not require that the rent be a definite amount in dollars. In a case where on the maximum rent date the tenant of a hotel structure or of a rooming house was obligated under a lease then in effect to pay a percentage of the gross receipts from the business conducted by the tenant in the structure, *while that percentage cannot be increased,* the actual dollar amount paid by the tenant to the landlord may fluctuate. This rental provision in the lease, if it was in effect on the maximum rent date, establishes the maximum rent." (Emphasis ours.)

(O.P.A. Interpretation M.R.-I. issued July 7, 1942; revised May 15, 1943—Pike and Fischer, O.P.A. Service, Vol. 8, page 200:1115.)

(Official interpretations of the Office of Price Administration have been adopted and confirmed successively by the Office of Temporary Controls (11 Federal Register 14, 704) the Office of Housing Expediter (12 Federal Register 2987) and the Office of Rent Stabilization (16 Federal Register 7631).)

In the instant case the first rent provided to be paid by the appellant to the appellees under the lease was gross receipts less the sum of Five Hundred and 00/100 Dollars ($500.00) (Plaintiff's Exhibit No. 1; Tr. 13). This rental provision in the lease established the maximum rent. The collection of a minimum of Two Thousand and 00/100 Dollars ($2,000.00) per month for the months of March, April and May, 1952, constituted an overcharge to the extent that such sums exceeded gross receipts less Five Hundred and 00/100 Dollars ($500.00).

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4. IT IS THE PROVINCE OF THE COURT TO DETERMINE THE MAXIMUM RENT UNDER ALL THE FACTS, APPLYING THE STATUTE AND THE REGULATIONS, AND NO ADMINISTRATIVE ACTION PURSUANT TO SECTION 166 OF THE HOUSING RENT REGULATION IS REQUIRED.

In the instant case the trial court concluded that, the maximum rental not having been declared or fixed in the first instance, either by administrative process or judicial decree, any action fixing a maximum rental of an amount less than that called for in the rental clause of the lease would, in effect, result in retroactive procedure wherein appellant would receive an unwarranted refund (Tr. 56). Apparently this conclusion was responsive to the finding that the Rent Director did not establish a maximum rent for the premises pursuant to Section 166 of Rent Regulation 1 (Tr. 56).

Both the finding and the conclusion proceed from a misapprehension as to the applicable law. There isn't any question of "fixing" a maximum rent by means of this action. The function and province of the court is to determine what the maximum rent was during the period in question, applying the applicable statutes and regulations to the facts.

Section 166 of the Housing Rent Regulation has no applicability whatsoever. This section, in pertinent part, provides as follows:

> "Sec. 166. *Orders where facts are in dispute, in doubt, or not known.* If the maximum rent, or any other fact necessary to the determination of the maximum rent * * * is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Director at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact * * * If the Director is unable to ascertain such fact, or facts, he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date. * * * "

If the Rent Director had fixed the maximum rent pursuant to Section 166, then the section and any determination made pursuant thereto would have been relevant. But, in this case, no order fixing maximum rent was ever made pursuant to Section 166 (Tr. 79, 80, 110, 123; Request for Admission No. 6, Tr. 37, admitted by Answer to Request, Tr. 39). Consequently it becomes the province of the court to determine what the maximum rent was.

This is fully considered and, we respectfully submit, determined in every respect in accord with the appellant's contentions in a well-reasoned opinion by Chief Judge Magruder in *United States v. McCrillis,* 1st Cir. 1952, 200 F2 884. The court considers at some length the matter of section 166 as it affects the jurisdiction and the function of the courts.

That was an action for restitution, damages and injunctive relief brought under the Housing and Rent Act of 1947. Because the premises had been controlled under the Emergency Price Control Act of 1942, the maximum rent under the 1947 Act was the rent in effect on the "freeze date" March 1, 1942. There was a dispute as to what that rent actually was. The landlord had registered the maximum rent as being $35.00 per month. At the time of such registration, in 1942, the tenant was one Imhoff. In June 1943 Imhoff was succeeded as a tenant by one Fleming who agreed to pay $35.00 per month and, in addition, incur the expense of certain repairs. Subsequent to the enactment of the Housing and Rent Act of 1947, the defendant rented to one Appleby at $50.00 per month and later, from June 1, 1948, to June 1, 1949, to one Bolin at $65.00 per month. This action is based on the alleged overcharges arising out of the Bolin tenancy. The landlord's defense was that the rent received from Imhoff on the freeze date in 1942 was actually $65.00 per month (despite the registration of the rent at $35.00), and consequently the lawful maximum was $65.00 per month.

Subsequent to June 1, 1949, but prior to the commencement of the action, *the area rent director purported to make an order determining maximum rent, which order was premised upon section 166* (14 FR 5718, sec. 825.5(d)). The area rent director found that the rent actually paid on the freeze date was only $35.00 and fixed the maximum rent at that amount retroactive to July 1, 1947.

The court concluded, however, that the order of the rent director was invalid for failure to give notice of the proceedings to the landlord and because, in any event, such an order could not be given retroactive effect.

There is no hesitancy in affirming the right of the courts to determine the facts which establish the maximum rent. The court says, at p. 890:

> "For cases where there is a dispute or doubt as to the fact necessary to the determination of a maximum rent, we can see that it was an appropriate exercise of the regulatory power, in aid of the orderly administration of the Act, for the Housing Expediter to provide, after notice and hearing, for the administrative determination of such doubtful or disputed fact, so as definitely to fix the maximum rent, for the future, in accordance with that determination. Once a maximum rent has thus been validly established, the landlord has got to observe it, and in an enforcement suit based upon alleged subsequent overcharges the landlord cannot go back of the order and get a trial de novo on the disputed fact.

But when the tenant Bolin complained to the area rent office in May, 1949, the appellees had either demanded and received an amount in excess of the maximum rent during the preceding periods, or they had not. That depended upon whether the rent on the freeze date was $35, or $65 per month. The Act itself fixed the maximum rent from and after July 1, 1947, continuing through the period of alleged violations here involved. *If issues of fact should arise as to what rent was being charged on the freeze date, as well as what rent was being charged during the periods of alleged overcharges, these are ordinary factual issues that can be perfectly well determined in the enforcement court;* they are not matters within the peculiar competence of the administrative agency. It serves none of the purposes of the Act for the administrative agency, in anticipation of the filing of an enforcement suit relating to past violations, to make an administrative determination of one or more issues of fact which would normally be determined in the enforcement court." (Emphasis ours.)

And at p. 887:

"Such maximum rent, *whatever its correct amount in fact,* remained in this case the lawful maximum rent * * * " (Emphasis ours.)

And again at p. 887, quoting from *Kalwar v. McKinnon,* 152 F2 263, 264:

" ' * * * in any litigation where the point becomes relevant the rent which was actually being charged on the freeze date must be factually determined.' "

What is more, the court held invalid a subsequent identical order of the rent director, made after notice to the landlord, but also made after the commencement of the action. It was held to be invalid not only because the order could not be made retroactive, but for the further reason that the "relevant issues of fact had been committed to the determination of the court" and "the government could not restrict the jurisdiction of the court by swooping down with an administrative determination of the only serious issue of fact pending for decision in the judicial proceeding" (p. 891).

It would seem clear then that if we had an issue of fact to be resolved in the instant case, the court would be the appropriate place to have it resolved. But, we respectfully submit, there isn't even an issue of fact to be resolved. What is presented is primarily a question of law—what is the maximum rent, what is the *first rent,* as determined from the undisputed facts.

We respectfully submit that in this case the trial court should have found, in accordance with the admitted or undisputed facts, that the first rent was gross receipts less Five Hundred and 00/100 Dollars ($500.00) and that this constituted the lawful maximum rent. The trial court should have found further that the gross receipts from the operation of the leased premises for the months of March, April and May, 1952, were, respectively, Nine Hundred Forty-Four and 00/100 Dollars ($944.00), One Thousand Two Hundred Sixty-Two and 50/100 Dollars

($1,262.50) and Two Thousand Four Hundred Sixty-Two and 00/100 Dollars ($2,462.00) (Plaintiff's Exhibits No. 2 and No. 3), and the court should have concluded that the maximum lawful rents in dollar amount for those months were, respectively, Four Hundred Forty-Four and 00/100 Dollars ($444.00), Seven Hundred Sixty - Two and 50/100 Dollars ($762.50) and One Thousand Nine Hundred Sixty-Two and 00/100 Dollars ($1,962.00). The receipt by the appellees of rent in the amount of Two Thousand and 00/100 Dollars ($2,000.00) for each of those months (Tr. 64) constituted an overcharge.

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5. THE APPELLANT IS ENTITLED TO JUDGMENT FOR AN AMOUNT NOT LESS THAN SINGLE NOR MORE THAN TREBLE THE AMOUNT OF THE OVERCHARGE OF RENT.

The appellant is entitled, under the statute, to recover not more than three times the amount of the overcharge unless the appellees shall establish that the overcharges were neither willful nor the result of failure to take practicable precautions against the occurrence of the violation (50 U.S.C.A. App. Sec. 1895(a)).

The burden of establishing the lack of willfulness and the taking of practicable precautions is upon the appellees.

Tanimura v. United States, 9 Cir. 1952, 195 F2 329, 330;

Orenstein v. United States, 1 Cir. 1951, 191 F2 184, 188, 192.

While it was unnecessary for the trial court to pass upon the issue of treble damages, in view of the judgment denying recovery of any overcharges, we feel that some brief comment might be directed appropriately to this matter. Giving full weight and complete credence to the testimony of appellees Fox and Gabrielson, and to appellees' witness Rhodes, the most that can be said is that the appellees were advised by their attorneys in December, 1951, that the premises were not subject to rent control (Tr. 75, 92, 93), and that they then made no further inquiries about the matter until late May or early June, 1952, when they first consulted with the Area Rent Office in Hayward (Tr. 82, 83, 93). The advice in December, 1951, was good advice—the premises were not under control at that time, but were brought under control on January 12, 1952 (17 Federal Register 403). There is no explanation as to why the appellees made no further inquiries about the matter for the next five or six months, particularly in view of the fact that the appellee Gabrielson knew that Parks Air Force Base, in the vicinity of the motel, was being reactivated and there were articles in the papers dealing with re-establishment of rent control in that area (Tr. 108, 109).

It would seem clear that no precautions of any sort were taken against the occurrence of the violations from the time that rent control was re-established in January until sometime late in May or in June.

CONCLUSION.

For the foregoing reasons the judgment of the trial court should be reversed with directions to enter judgment for the appellant in an amount not less than the single overcharges of rent, namely Two Thousand Eight Hundred Thirty-One and 50/100 Dollars ($2,831.50), and in such greater amount not in excess of treble the amount thereof as may seem proper to the court, and for reasonable attorneys' fees.

Dated, San Francisco, California,
April 11, 1955.

Respectfully submitted,
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